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No. 984 125

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC AND GULF DISTRICT, HARBOR AND INLAND WATERWAYS DIVISION, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, AND SUPERIOR DERRICK CORPORATION, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement	3
I. The Facts	3
A. Background	3
B. The Strike and Picketing	5
1. Picketing at the Charbonnet Street Wharf	5
2. Picketing at Wood Park	6
3. Picketing at Gretna Wharf	6
4. Picketing at the Dumaine Street Wharf	8
5. Other Picketing	11
II. The Board's Decision	11
III. The Proceedings in the Court of Appeals	13
Reasons for Granting the Writ	16
Conclusion	27

Appendix	1a

AUTHORITIES CITED

Cases:	Page
Brotherhood of Railroad Trainmen v. Baltimore & Ohio Railroad Co., 331 U.S. 519	26
Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197	25
Federal Power Commission v. Idaho Power Co., 344 U.S. 17	25
Jacob Siegel Co. v. Federal Power Commission, 327 U.S. 608	26
Local 618, Automotive Employees Union v. National Labor Relations Board, 249 F. 2d 332	17
Mallow v. Hinde, 12 Wheat. 193	27
Moore Dry Dock Co., 92 NLRB 547	16, 18
National Labor Relations Board v. Associated Musicians, 226 F. 2d 900, cert. denied, 351 U.S. 962	17
National Labor Relations Board v. Bangor Building Trades Council, 46 LRRM 2004	18
National Labor Relations Board v. Denver Building & Construction Trades Council, 341 U.S. 675	21
National Labor Relations Board v. Jones & Laughlin Steel Corp., 331 U.S. 416	23
National Labor Relations Board v. Local Union No. 55, 218 F. 2d 226	17, 18
National Labor Relations Board v. Service Trade Chauffeurs, 191 F. 2d 65	17, 18, 22
National Labor Relations Board v. Teamsters Local Union No. 135, 212 F. 2d 216	17
National Labor Relations Board v. Truck Drivers Local Union No. 449, 353 U.S. 87	25
National Labor Relations Board v. United Mine Workers, 355 U.S. 453	24
Piezonki v. National Labor Relations Board, 219 F. 2d 882	17
Sales Drivers Local Union 859 v. National Labor Relations Board, 229 F. 2d 514, cert. denied, 351 U.S. 972	17, 18

Page

Salt Dome Production Company, 119 NLRB 1638 24
Seafarers International Union v. National Labor Relations Board, 265 F. 2d 585 .....17, 18, 19, 21, 24
Superior Derrick Corporation, 126 NLRB No. 27, 45 LRRM 1298 5
United Hatters Union, 121 NLRB 1154 25
United States v. W. T. Grant Company, 345 U.S. 629 .. 25
Universal Camera Corporation v. National Labor Relations Board, 340 U.S. 474 25

STATUTES:

28 U.S.C. 1254(1) 2

Labor Management Reporting and Disclosure Act of 1959, Title VII, Section 704(a) (P.L. 86-257, 86th Cong., 1st Sess., 73 Stat. 519) 3

National Labor Relations Act (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*):

Section 8(b)(4) 13, 14
Section 8(b)(4)(A) 2, 3
Section 8(b)(4)(B) 2, 3

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Seafarers' International Union of North America, Atlantic and Gulf District, Harbor and Inland Waterways Division, AFL-CIO, herein called the Union, prays that a writ of certiorari issue to review the decrees of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on March 9, 1960, and May 23, 1960.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 273 F. 2d 981 (*infra*, pp. 1a-11a). The decisions and orders of the National Labor Relations Board are reported at 122 NLRB 52 (R. 76-94, 40-59) and at 127 NLRB No. 11 (*infra*, pp. 14a-17a).

JURISDICTION

The decrees of the Court of Appeals were entered on March 9, 1960 (*infra*, p. 12a) and on May 23, 1960 (*infra*, p. 19a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether picketing at a common situs jointly occupied by a primary employer and a neutral employer, conducted in such a manner as to make it clear that the dispute is with the primary employer only, is a secondary boycott prohibited by Section 8(b)(4)(A) and (B) of the National Labor Relations Act if employees of the neutral employer observe the picket line.

2. Whether, in a proceeding to review the partial dismissal of a complaint by the National Labor Relations Board in which the reviewing court rejects the Board's ground for dismissal, the reviewing court may itself adjudicate additional questions which the Board expressly refrained from passing on and direct the Board "to enter an appropriate injunction," instead of remanding to the Board for its initial determination of the reserved questions.

3. Whether, in a proceeding to review the partial dismissal of a complaint by the National Labor Relations Board, the reviewing court may deny intervention to the person against whom the complaint was issued and, without that person's participation as a party, find that the person has engaged in illegal activity and direct the Board "to enter an appropriate injunction" against the person.

STATUTE INVOLVED

Section 8(b)(4)(A) and (B) of the National Labor Relations Act, as amended in 1947 (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*), makes it "an unfair labor practice for a labor organization or its agents":

> to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring . . . any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9. . . .

Section 8(b)(4)(A) and (B) has not been amended in any respect material to the questions presented by this petition by Section 704(a), Title VII, Labor-Management Reporting and Disclosure Act of 1959 (P.L. 86-257, 86th Cong., 1st Sess., 73 Stat. 519).

STATEMENT

I. THE FACTS

A. Background

Superior Derrick Corporation owns and operates two floating derricks in the port of New Orleans (R. 79; J.A. 3). It also provides a labor force for River and Gulf Transfer Company at Wood Park, Louisiana,

about 30 miles down the Mississippi River from New Orleans, where the latter company is engaged in loading and unloading bulk materials for shipment in interstate commerce (R. 79; J.A. 3, 6).

Petitioner Union began organizing Superior's employees early in July 1957 (R. 45; J.A. 7-8). On July 9, at Wood Park, Thomas Gould, a representative of the Union, contacted James Howlett, Superior's superintendent. Gould claimed and offered to prove that the Union represented a majority of Superior's laborers at Wood Park, as well as its derrick crews, and asked for recognition of the Union as bargaining representative (R. 45, 79; J.A. 8-9, 121-122). Howlett informed Gould that he did not have the appropriate authority in such matters, but that he would refer the request to one Maught, who had such authority (R. 79; J.A. 9). Several times between July 9 and July 12, Gould telephoned Howlett about seeing Maught, but no meeting was arranged (R. 79; J.A. 9-11). On July 12, the Union wired Superior, reiterating that its employees had authorized the Union to represent them and requesting a meeting to discuss the terms of an agreement (R. 45-46; J.A. 152).

Superior did not respond to the wire (R. 46). Instead, on July 13, Superior entered into a written contract covering its employees with a labor organization called "Employees Group" (R. 46). On July 15, the Union filed unfair labor practice charges against Superior (R. 43; J.A. 4). On August 22, without the Union's concurrence, an informal settlement agreement was entered into between Superior and the Board's Regional Director (*ibid.*). On September 18, the Union filed additional unfair labor practice charges against Superior (*ibid.*). On January 19, 1960, the Board entered

an order against Superior requiring it to desist from the unfair labor practices found and to take certain affirmative remedial action. *Superior Derrick Corporation*, 126 NLRB No. 27, 45 LRRM 1298.

B. The Strike And Picketing

Meanwhile, the evening of July 12, 1959, after Superior had failed to respond to the request for recognition, all Superior's employees then working went on strike (R. 46; J.A. 122). Picketing took place in conjunction with the strike. The picket signs throughout the course of picketing bore the following legend (R. 46, 79; J.A. 20-21, 85-86):

NO DISPUTE WITH ANY
OTHER EMPLOYER
SUPERIOR DERRICK CORP.
ON STRIKE
FOR BETTER WAGES
HOURS & CONDITIONS
SEAFARERS INT. UNION
AFL-CIO

1. Picketing At The Charbonnet Street Wharf

The evening that the strike began, the Company's derricks were located at the Charbonnet Street Wharf in New Orleans, being used there to load a cargo of steel aboard a ship (R. 46, 79; J.A. 13-14, 109). Longshoremen assisting in loading the vessel were employed by Atlantic and Gulf Stevedores, Inc., and were members of Locals 1418 and 1419 of the International Longshoremen's Association (R. 80). It is agreed that Superior and Atlantic and Gulf, both controlled by the same parent corporation, are allied employers, and that Atlantic and Gulf consequently does not occupy the status of a neutral employer (R. 47, 80, n. 5; J.A. 53).

The Union picketed at the location of the derricks at the Charbonnet Street Wharf from the evening of July 12 until July 15. The longshoremen observed the picket line. Superior moved its derricks from the wharf on July 15, and the picketing thereupon ceased. (R. 46-47, 80; J.A. 13, 83-86.)

2. Picketing at Wood Park

The Union began picketing on July 15 at Wood Park, the location of Superior's labor crew (R. 47; J.A. 110). The local sheriff "ran . . . off" the pickets and his deputy jailed one of them (R. 47; J.A. 123, 135, 112). On August 9, a federal district court issued an injunction to restrain the local authorities from such action (R. 47; J.A. 129, 135). The same day the injunction issued, the local sheriff and district attorney (Leander Perez) told a representative of the Union that if he "wanted to get shot to come on down," and thereafter the deputy sheriff ordered the representative "to get out of his parish" and advised him not to "get brave because you got that injunction" (R. 47; J.A. 135, 150, 129). The Union did not attempt to picket at Wood Park after July 15 (R. 47; 123, 135).

3. Picketing at Gretna Wharf

Early on the morning of September 22, the Company began derrick operations at the Gretna Wharf property of the Southern Pacific Railroad (R. 48; J.A. 17-18). Its operations there consisted of unloading, by boom, a cargo of bauxite from a vessel to railroad gondolas on the wharf (R. 48; J.A. 18-19). The two derricks were made fast to the wharf and the vessel was tied up offshore the derricks (R. 48; J.A. 17-18).

About 8 or 9 a.m., a Union representative, Martin Gould, came to the wharf and began picketing at the

extreme edge of the dock, near the ladder which gave the only access to the derricks (R. 48; J.A. 19, 135-136). At about 10 a.m., members of a Southern Pacific train crew, who were to move the loaded gondolas from the wharf and replace them with empties, approached Martin Gould and Herman Troxclair, another Union representative, and asked them what the picketing was about (R. 48; J.A. 142-143, 154-155). The members of the train crew were referred to the picket sign as self-explanatory, and were specifically told that "the picket line was not directed at the railroad" (R. 48-49; J.A. 143, 154-155). As explained by Union representative Martin Gould (R. 48-49; J.A. 143):

> One of the men asked me if I was picketing the wharf. I told him no. I wasn't picketing the wharf. I was picketing Superior Derrick Corporation.
>
> * * *
>
> And that is all. The picket line was directed solely toward them and no other employer.

About an hour later the two pickets were ordered off the wharf by Southern Pacific officials. The nearest point that the Union was thereafter permitted to picket was at the junction of a public road and Southern Pacific's private road which adjoined tracks leading up to and onto the wharf. This point was about 1,600 feet from the derricks. (R. 49; J.A. 28-30.)

Superior's superintendent, James Howlett, went to the train crew and asked them to remove the loaded cars and bring empties. The crew complied with this request about noon, when they hauled away the loaded cars on one track, but brought no empties. (R. 49; J.A. 25-26.)

Picketing continued at the public road throughout the next day, September 23 (R. 50; J.A. 139). About 10 a.m., railroad officials informed Union representative Martin Gould that a train would be brought in, and fifteen minutes later one appeared, stopping short of the picket line (J.A. 146). The railroad officials brought the engineer and train crew to the picket line, and the following conversation ensued (J.A. 147):

> [A railroad official] asked me [Union representative Martin Gould] if this picket line was against the railroad and I told him no, it was solely directed towards Superior Derrick Corporation. He told the engineer, "You see, it is not against you at all. Now, go on and make the shift."
>
> The engineer told him, "No, I am not going in there. My constitution gives me the right not to cross another union's picket line." They talked along these lines a few minutes amongst themselves and then the officials took the train in.

Unloading the vessel with the use of derricks was carried on and completed, the train cars being moved by railroad white collar workers (R. 50; J.A. 34, 37-39).

The derricks remained at the wharf until removed on September 24 (R. 50; J.A. 42-43). With the removal of the derricks from the wharf picketing at the public road ceased (R. 50; J.A. 139).

4. Picketing at the Dumaine Street Wharf

On October 9, one of Superior's derricks was moved to the Dumaine Street Wharf in New Orleans, where Superior had contracted with Texla Stevedoring, Inc., to unload steel plates from a barge and load them aboard a ship (R. 50-51, 80; J.A. 45-46). To accomplish this, the ship was moored against the wharf, with the derrick on the river side of the ship, and the barge

next to the derrick (R. 80; J.A. 47). Texla employed some 75 to 100 longshoremen, represented by Locals 1418 and 1419 of the International Longshoremen's Association, to perform the longshore work on the ships (R. 51, 80; J.A. 46, 71-72). During the morning of October 9, the Union did not picket the derrick operations and the work of the employees of Superior and Texla proceeded without interruption (R. 51, 80; J.A. 47).

The lunch hour for the longshoremen was between 12 noon and 1 p.m., at which time most of them went on the dock to eat (R. 51, 80; J.A. 47-48). Shortly before the end of the lunch hour, Union representative Thomas Gould appeared at the wharf and placed pickets at the vessel's gangway which led to the ship and the derrick (R. 51, 80; J.A. 124-125). This was the closest point where picketing against Superior and appeals to its employees could be made, since the gangway was the only means of access to the derrick and Superior's employees had to use the gangway to board or leave the derrick (R. 80; J.A. 78).

During the lunch hour, after the picket line was established, some of the longshoremen asked Union representative Gould what the picketing was about. Gould did not reply. (R. 80-81; J.A. 130-131.) Still during the lunch hour, E. C. Cook, Texla's superintendent in charge of the longshoremen working the ship, approached Union representative Gould, and the following conversation took place (R. 51; J.A. 127, see also J.A. 74, 80):

> [Cook asked], "What is going on here? What are you picketing this ship for?"
>
> I told him, "Read that sign, we are not picketing that ship."

> He said, "That's the derrick," and I said, "Yes, that's right."
>
> * * *
>
> I said, "My beef is with Superior" and he said, . . . "Can I work my hatches," and I told him, "I can't tell you to work them or not to work them. There is my sign right there," and he left.

Cook, Texla's superintendent, admittedly understood from the picket sign that the dispute was only with Superior (J.A. 73-74, 79-80).

At 1 p.m., at the end of the lunch period, the longshoremen employed by Texla observed the picket line and did not resume their work on the ship (R. 51, 81; J.A. 48, 50, 74). Thereupon, Texla superintendent Cook called representatives of the Longshoremen's Local Unions to which the longshoremen belonged (R. 51; J.A. 75). He was informed that "they had delegates on the way out" (J.A. 75), the longshoremen having already called during the lunch hour because "they didn't know whether they should go back to work or not" (J.A. 90).

About 1 or 1:10 p.m., Paul Guillory, an agent for Longshoremen's Local 1419, arrived at the scene (J.A. 94). He told Union representative Gould that, "I am going to have to send these men across this line," explaining that, "we have a contract with these people and we have to fulfill our contract" (R. 51; J.A. 125). Gould replied that, "If you want to cross it you cross it, and if you don't you don't"; "I am not telling you to go to work or not to go to work. It is not my place to say anything to you about your work. That is your business. There is our sign and a legitimate picket line of SIU . . ." (R. 52; J.A. 125-126).

Guillory instructed the longshoremen to return to work (R. 52; J.A. 98). They did so about 2:30 pm., the delay in returning being due to the longshoremen's desire for assurance, which they obtained, that Texla would pay them "with no loss of time" (R. 52; J.A. 98, 50).

Although pickets remained at the gangway, there was no further work stoppage; picketing continued at this location only when the derrick was there, and picketing ceased with the removal of the derrick upon completion of the job (R. 52; J.A. 76-77, 78-79, 128).

5. Other Picketing

Thereafter, the Union picketed Superior's derrick operations at three other jobs in the port (R. 52; J.A. 51-52). There is no claim or evidence that this picketing was unlawful (R. 52).

II. THE BOARD'S DECISION

The General Counsel claimed that, at the Gretna Wharf and the Dumaine Street Wharf, the Union's picketing was secondary in character, in that "an object" of the picketing at Gretna was to induce railroad employees to cease working, and at Dumaine Street to induce longshoremen to cease working (R. 54-55). Rejecting this claim the Trial Examiner found that the picketing was "primary in character," being directed at Superior with whom the Union had its dispute (R. 56-58). He found that, as to the longshoremen at Dumaine Street, the Union's activity did not reveal that "an object of the picketing was to induce secondary employees to cease work" (R. 56). He further found, as to the railroad workers at Gretna, that (R. 58):

> Seafarers' did not begin to picket at Gretna until Superior's derricks, the situs of the primary dispute, appeared and began work. The pickets took up their first position at the extreme end of the dock, as close as physically possible to the derricks, until rocks fell upon them. They remained at a safer distance, but still upon the dock, until railroad inspectors forced them to retire to a public road, a quarter of a mile away. The evidence is clear that by neither word nor deed did the pickets attempt to cause the railroad crews from carrying out their work. The picket signs specifically revealed that the dispute was only with Superior; it is undisputed that when the railroad crews queried pickets they were told, in unequivocal terms that the dispute was only with Superior. The picketing ceased promptly upon the withdrawal of Superior's derricks.

The case was transferred to a three-member panel of the Board. The Board concluded, one member dissenting, that as "railroad employees are not employees within the meaning of the Act," the Union at Gretna "did not induce 'employees' to engage in" secondary activity (R. 77-78). It therefore found it "unnecessary to resolve" the question whether the picketing at Gretna was primary or secondary (R. 78).

The Board further concluded, another member dissenting and reversing the examiner, that the Union's picketing at the Dumaine Street Wharf was secondary (R. 78-84). The reversal of the examiner was based on the single circumstance that, when the longshoremen asked the Union representative what the picketing was about, the representative did not reply (R. 81-82, *supra*, p. 9). The Board was of the view that, as the longshoremen at the Charbonnet Street Wharf had three months before observed the Union's picket

line (*supra*, p. 6), the Union's representative "could reasonably anticipate that the longshoremen [at the Dumaine Street Wharf] would not cross the picket line, regardless of the legend on the picket signs," and that it was therefore "incumbent upon" him "to answer the questions of the longshoremen so as to make it clear to them that the picketing was not directed against them in order to minimize any possible interference with the work of the neutral employer, Texla" (R. 81). The Board, regarded as irrelevant (1) the fact, which it acknowledged to be true (R. 80, n. 5), that inducement of the longshoremen at the Charbonnet Street wharf to observe the picket line at that location was entirely lawful, for their employer was allied with Superior, and (2) the fact that the railroad employees observed the picket line at the Gretna Street Wharf despite an explanation to them that it was directed at Superior only (R. 83).

Based on its findings at the Dumaine Street Wharf, the Board entered an order requiring the Union to desist from secondary activity, and, based on its finding that railroad workers are not employees within the meaning of the statute, the Board entered an order dismissing the complaint insofar as it was predicated on the picketing at the Gretna Wharf (R. 84-86).

III. THE PROCEEDINGS IN THE COURT OF APPEALS

Superior petitioned the Court of Appeals to review the order insofar as it dismissed the complaint based on the determination that railroad workers are not employees whose inducement is prohibited by Section 8(b)(4) (R. 1-5). The Board petitioned the Court of Appeals to enforce the order against the Union (R. 10-12). The Court consolidated the two proceedings. The Union moved to intervene in the proceeding

instituted by Superior (R. 15-22). The Court denied intervention but granted the Union leave to file a brief as amicus curiae (R. 23).

Adhering to its "prior decisions to the contrary," the Court of Appeals reversed the Board's determination that railroad workers are not "employees" within the meaning of Section 8(b)(4) of the statute (*infra*, pp. 3a-4a).[1] In its brief to the Court of Appeals the Board had stated that, should the Court adhere to its view on this question and reject the Board's, a remand would be appropriate in order for the Board to consider whether the activity at the Gretna Wharf was primary or secondary, explaining that (pp. 12-13):

> . . . [S]hould the Court adhere to its prior decisions, this would, of course, nullify the ground on which the Board dismissed the portion of the complaint relating to the Union's activity at Gretna Wharf. But, it does not follow that such activity was violative of the Act's secondary boycott provisions, for the question remains as to whether the inducement of railroad employees was an incident of legitimate primary activity directed at Superior, or whether it exceeded the bounds of such activity. * * * Since a majority of the Board, in view of its position on the railroad employee question, found it unnecessary to reach this further issue (R. 77-78), a remand to the Board for a consideration of that issue would be appropriate were

[1] As the court notes, the 1959 amendments, by changing "employees of any employer" to "any individual employed by any person," have unambiguously placed railroad workers within the class of persons who may not be induced to engage in the activity prohibited by Section 8(b)(4) (*infra*, p. 4a). This petition does not present any question as to whether the Board or the court was correct in the interpretation of Section 8(b)(4) before the amendment as it pertains to the coverage of railroad workers.

the Court to set aside the original basis for the Board's dismissal.

But the Court of Appeals did not follow that course. Acknowledging that the Board had not "determined, even conditionally, whether the action constituted illegal picketing" (*infra*, p. 4a), the Court nevertheless took the view that, "Since the law is, at least in this Court, now so clear . . . , we think this record is compelling that the Board could not have made any finding other than illegality so that it requires that we direct the issuance of an order prohibiting picketing of this kind" (*infra*, pp. 4a-5a). The element which was decisive in the Court's view was that the railroad workers did choose to observe the picket line, and in the light of the demonstrated "effectiveness of the picket line . . . it is of no real consequence that . . . the pickets may have used the words that it was 'directed' against Superior only and not the railroad" (*infra*, p. 5a). Accordingly, the Court remanded to the Board "with directions to enter an appropriate injunction" (*infra*, p. 11a).

The Court of Appeals affirmed the Board's position that the picketing at the Dumaine Street Wharf was secondary, but on broader grounds which nullified the Board's rationale. The court stated that "A picket line is a potent instrument. . . . [I]t has a special message of its own. To a loyal unionist it is both a spontaneous plea not to engage in any business activity with those behind the picket curtain and an instantaneous branding of 'unfairness' on those engaged in activity behind the picket line" (*infra*, p. 10a). Consequently, the court continued, "The activity, including the picket line, must be conducted in such a way that the normal appeal of a picket line *is overcome*" (*infra*, p. 10a, emphasis supplied). If it is not overcome, and em-

ployees of neutral employers do observe the picket line, this result suffices to stamp the picketing as secondary.

Upon the remand to the Board, in accordance with the court's "directions to enter an appropriate injunction" based on the picketing at the Gretna Wharf (*infra*, p. 11a), the Board amended its order to prohibit inducement of the employees of the Southern Pacific Railroad Company (*infra*, p. 16a), and thereafter a supplemental decree was entered enforcing the amended order (*infra*, p. 19a).

REASONS FOR GRANTING THE WRIT

1. The fundamental substantive question in this case is determination of the standard which should govern in ascertaining whether picketing at a common situs jointly occupied by a primary employer and a neutral employer is primary or secondary. The view of the court below is admittedly in conflict with the rationale endorsed by other Courts of Appeals.

(a) The inquiry may be put into quick focus. When a union has a dispute with an employer, picketing at the premises exclusively occupied by that employer is primary and protected. When, in furtherance of that primary dispute, the union pickets the premises exclusively occupied by a neutral employer, the picketing is secondary and prohibited. The troubling question arises when the primary employer and the neutral employer occupy the same premises. In such a situation, to accommodate the right of the union to picket the primary employer with the right of the neutral employer to be free of picketing, the Board early held that "picketing of the premises of a secondary employer is primary if it meets the following conditions" (*Moore Dry Dock Co.*, 92 NLRB 547, 549):

(a) The picketing is strictly limited to times when the *situs* of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs;* (c) the picketing is limited to places reasonably close to the location of the *situs;* and (d) the picketing discloses clearly that the dispute is with the primary employer.

This accommodation has been "widely approved" [2] and adopted as "a sound interpretation of the Act" [3] by the Courts of Appeals for the Second,[4] Fourth,[5] Seventh,[6] Eighth,[7] Tenth,[8] and District of Columbia Circuits.[9] If picketing at a common situs meets the formulated criteria, then the picketing is "not unlawful because employees of the secondary employers, or employees of other employers, due to their habitual unwillingness to cross picket lines, refuse . . . to do so, for such effects are within the realm of the 'inci-

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[2] *National Labor Relations Board* v. *Associated Musicians*, 226 F. 2d 900, 905 (C.A. 2), cert. denied, 351 U.S. 962.

[3] *National Labor Relations Board* v. *Service Trade Chauffeurs*, 191 F. 2d 65, 68 (C.A. 2).

[4] *Supra* notes 2 and 3.

[5] *Piezonki* v. *National Labor Relations Board*, 219 F. 2d 879, 882-883 (C.A. 4).

[6] *National Labor Relations Board* v. *Teamsters Local Union No. 135*, 212 F. 2d 216, 219 (C.A. 7).

[7] *Local 618, Automotive Employees Union* v. *National Labor Relations Board*, 249 F. 2d 332, 335 (C.A. 8).

[8] *National Labor Relations Board* v. *Local Union No. 55*, 218 F. 2d 226, 230-231 (C.A. 10).

[9] *Seafarers International Union* v. *National Labor Relations Board*, 265 F. 2d 585, 589 (C.A.D.C.); *Sales Drivers Local Union 859* v. *National Labor Relations Board*, 229 F. 2d 514 (C.A.D.C.), cert. denied, 351 U.S. 972.

dental'." *National Labor Relations Board* v. *Service Trade Chauffeurs*, 191 F. 2d 65, 68 (C.A. 2). "Section 8(b)(4)(A) does not contain a provision which condemns concerted activity of employees with respect to their own employer merely because it occurs at a place where it comes to the attention of and incidentally affects employees of another . . ." *Sales Drivers Local Union 859* v. *National Labor Relations Board*, 229 F. 2d 514, 517 (C.A.D.C.), cert. denied, 351 U.S. 972. "Mere incidental effect on the secondary employer is not enough to constitute a secondary boycott." *National Labor Relations Board* v. *Local Union No. 55*, 218 F. 2d 226, 230 (C.A. 10). See also, *Seafarers International Union* v. *National Labor Relations Board*, 265 F. 2d 585, 590, 591 (C.A.D.C.). The heart of the accommodation is that picketing at a common situs which meets the prescribed criteria does not become secondary simply because, despite its circumscription, it nevertheless does not succeed in neutralizing observance of the picket line by employees of a secondary employer.

The court below disagrees. It recognizes "a difference in the approach of this Court and some other circuits . . ." (*infra*, p. 7a).[10] It identifies the difference. "It is not, as some courts sometimes seem to have intimated, a question of whether the *effect* is direct or inci-

[10] Contrast the statement of the court below that, "If *any* object of the picketing is to subject the secondary employer to forbidden pressure then the picketing is illegal. * * * It need not be the sole or even main purpose" (*infra*, pp. 8a-9a), *with* the statement of the Court of Appeals for the First Circuit that "A word such as 'direct' or 'immediate' should perhaps be inserted before the word 'object' in view of the protection afforded to primary disputes under Section 13 of the Act." *National Labor Relations Board* v. *Bangor Building Trades Council*, 46 LRRM 2004, 2005, n. 1 (April 18, 1960).

dental" (*infra*, p. 9a). "It is not, as the *Moore Dry-dock* doctrine phrased it, merely a question of negativing the existence of a dispute with the secondary employer" (*infra*, p. 10a). The court below states explicitly that "we find ourselves unable to accept the rationale of *Seafarers' International Union etc.* v. *N.L.R.B.* (*Salt Dome Production*), D.C. Cir., 1959, 265 F. 2d 585 . . ." (*infra*, p. 9a). The fundamental disagreement between the court below and the Court of Appeals for the District of Columbia Circuit is illustrated by a quotation from each of the opinions. The court below states that (*infra*, p. 10a):

> But if [on the part of the picketing union] there is an expectation or a hope or a desire that employees of the secondary employer will be induced or encouraged to take *concerted* action so that the secondary employer will cease doing business with the primary employer, then the Act bars that activity.

The Court of Appeals for the District of Columbia Circuit takes a different view (265 F. 2d 585, 592):

> But hope and objective cannot be equated. Unions, like many other organizations, may hope for many things without making those things objects of their programs. Men have many hopes which are not objectives of action. If the statutory clauses here involved were to be interpreted as forbidding any strike in which a labor organization hoped that another employer would cease doing business with the primary employer, almost all strikes would be outlawed; we would suppose that almost all strikers hope other employees will support them, with the natural results of such support.

The essence of the contrary position taken by the court below is that, at a common situs, "The activity,

including the picket line, must be conducted in such a way that the normal appeal of a picket line *is overcome*" (*infra*, p. 10a, emphasis supplied). If it is not "overcome," and employees of neutral employers do observe the picket line, then the picketing is secondary regardless of the union's efforts to cabin its influence. And so, in the court's view, the picketing at the Gretna Wharf was secondary simply because the railroad employees observed the picket line, and the picketing at the Dumaine Street Wharf was secondary simply because the longshoremen observed the picket line. It makes no difference that at the Gretna Wharf, as the trial examiner found, "The evidence is clear that by neither word nor deed did the pickets attempt to cause the railroad crews from carrying out their work. The picket signs specifically revealed that the dispute was only with Superior; it is undisputed that when the railroad crews queried pickets they were told in unequivocal terms that the dispute was only with Superior" (R. 58). For, as the court below states, once "the effectiveness of the picket line" is demonstrated, "it is of no real consequence that . . . the picket may have used the words that it was 'directed' against Superior only and not the railroad" (*infra*, p. 5a). Similarly, it makes no difference that at the Dumaine Street Wharf the longshoremen observed the picket line only for the very short period that they were awaiting word from their own representative as to the course they should take, that they crossed the picket line upon instructions from their representative, that it was obvious that nothing that could be done by the picketing Union would dissuade the longshoremen from observing the picket line until their own representative was heard from, and that the picketing Union did not request the longshoremen's representative to honor the line

(*supra*, pp. 10-11). All that is truly relevant in the view of the court below is that the longshoremen did observe the line.

This total insulation of the neutral employer is at war with "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *National Labor Relations Board* v. *Denver Building & Construction Trades Council*, 341 U.S. 675, 692. To stamp picketing at a common situs as secondary whenever its consequence is observance of the picket line by a neutral's employees is effectively to negate the congressional objective of "preserving the right of labor organizations to bring pressure to bear on offending employers in primary disputes. . . ." It makes the legality of picketing and the responsibility of the union dependent, not upon the union's own adherence to objective standards of conduct, but upon the subjective reactions of employees of others whom the union does not control. Even if the union requests the employees to cross the line, the picketing is secondary if the employees choose to disregard the request. Under the view of the court below picketing at a common situs is illegal, and the union undertakes it at its peril, unless the union is able to guarantee a negative response upon the part of employees who approach the line.

Yet, as the Court of Appeals for the District of Columbia Circuit stated, "The cases recognize the very practical fact that, intended or not, sought for or not, aimed for or not, employees of neutral employers do take action sympathetic with strikers and do put pressure on their own employers." *Seafarers International*

Union v. *National Labor Relations Board*, 265 F. 2d 585, 590. And, as the Second Circuit stated, to hold that the consequence of such action at a common situs is that "the union may not there picket in any way, because the secondary employer might thereby be injured, would be virtually to deprive the union of a powerful weapon which Congress meant to preserve." *National Labor Relations Board* v. *Service Trade Chauffeurs*, 191 F. 2d 65, 67-68. Consequently, to prevent negation of picketing at a common situs, if such picketing meets the formulated criteria, then the picketing is "not unlawful because employees of secondary employers, or employees of other employers, due to their habitual unwillingness to cross picket lines, refuse . . . to do so, for such effects are within the realm of the 'incidental'." *Id.* at 68.

The conflict between the court below and other Courts of Appeals upon this important and recurring question should be settled by this Court. Resolution is required not only to guide the Board and the Courts of Appeals in adjudication, but, at least as importantly, to enable the parties to labor disputes to know how to conduct picketing at a common situs. This is especially vital in the maritime world, for a vessel is almost always docked at another person's wharf, and employees of others are constantly about it.

(b) The Board on the merits limited its decision to finding that the picketing at the Dumaine Street Wharf was secondary (*supra*, p. 12). The Board's approach, while verbally more circumspect than the court's, is in essence as destructive of picketing at a common situs. To stamp the picketing as secondary, the Board isolates the single circumstance that, when asked by some longshoremen what the picketing was about, the

Union representative did not reply (*supra*, pp. 12-13). In no other respect was the Union's activity found to be remiss in the least degree. It accorded precisely with the formulated criteria for picketing at a common situs.

The Board's isolation of and reliance upon this single factor is adjudicatory flyspecking. As the dissenting member stated, "Throughout the course of its dispute with Superior, the . . . [Union's] pickets carried signs which declared 'No Dispute With Any Other Employer —Employees of Superior Derrick Corp. on Strike. . . .' I cannot conceive of any language which could convey to Texla's employees with greater clarity that the dispute was with Superior and was not directed against them" (R. 88-89). Oral confirmation would add nothing. The particular longshoremen at this location, unlike the particular longshoremen who crossed the picket line at the Gretna Wharf (J.A. 113-114), sought the advice of their own representative "whether they should go back to work or not" (J.A. 90), and words would not dissuade them from awaiting his instructions before crossing the line (*supra*, pp. 9-11). Furthermore, to refrain from picket line conversation is a necessary precaution in order to minimize the real risk that sinister significance will be drawn from accidental language. To draw equally sinister significance from silence is to make it virtually impossible to safely carry on picketing at a common situs by scrupulous observance of objective standards of conduct. When an unanswered question becomes the difference between legal and illegal picketing, trivia governs the right to picket at a common situs.

2. The Board has never itself decided the merits of the question whether the picketing at the Gretna

Wharf was primary or secondary. In its first decision, a majority of the Board held that railroad workers were not employees within the meaning of the Act whose inducement was disallowed by Section 8(b)(4); that majority expressly stated that it was, therefore "unnecessary to resolve" the question whether the picketing at Gretna was primary or secondary (R. 77-78). The court below reversed. It not only rejected the Board's basis of decision as erroneous in law, but it decided for itself that the picketing at the Gretna Wharf was secondary, and it remanded to the Board "with directions to enter an appropriate injunction" (*infra*, p. 11a). Under compulsion of that remand the Board amended its order to prohibit inducement of the employees of the Southern Pacific Railroad Company (*infra*, p. 16a).

Bypassing the Board upon the merits of the question was egregiously heedless of the "orderly administration of the Act and due regard for the respective functions of the Board and reviewing courts. . . ." *National Labor Relations Board* v. *United Mine Workers*, 355 U.S. 453, 464. Remand to the Board for its initial determination did not entail a circuitous and futile formality. The trial examiner had found that the picketing was primary (*supra*, pp. 11-12). In the Board's first decision, the dissenting member stated that he would find that the picketing was secondary, citing *Salt Dome Production Company*, 119 NLRB 1638 (R. 78, n. 3). The latter decision was set aside by the Court of Appeals for the District of Columbia Circuit. *Seafarers International Union* v. *National Labor Relations Board*, 265 F. 2d 585. In the Board's supplemental decision, one member of the Board expressed his "respectful disagreement" with the court's view that the

picketing was secondary (*infra*, p. 15a, n. 3). Thus, of the three Board officials with an adjudicatory responsibility who expressed a view on the merits, two thought the picketing was primary and one secondary.

The circumstances commanded a remand to the Board for its initial determination of the merits. "[W]here the matter is one involving complicated or disputed facts or questions of statutory policy, a remand to the Board is ordinarily in order"; the "issue is one normally to be determined by the Board in the first instance, it being the function of the Board rather than the courts initially to correlate the policies of the Act with conflicting interests." *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416, 428. The "guiding principle, violated here, is that the function of the reviewing courts ends when an error of law is laid bare. At that point the matter once more goes to the . . . [agency] for reconsideration." *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20. Remand is essential to preserve the fact-finding (*Universal Camera Corporation* v. *National Labor Relations Board*, 340 U.S. 474) and balancing (*National Labor Relations Board* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87, 96) functions of the Board.

The court below compounded its error by directing the Board "to enter an appropriate injunction," thus withdrawing from the Board the power to decide that the circumstances did not warrant any remedy, as the Board not infrequently determines. *E.g.*, *United Hatters Union*, 121 NLRB 1154. Inquiry into whether any relief is appropriate is an ordinary attribute of the exercise of remedial power (*United States* v. *W. T. Grant Company*, 345 U.S. 629, 633), and to negate it invades the administrative province of initially ascer-

taining the relief warranted, if any. *Jacob Siegel Company* v. *Federal Trade Commission*, 327 U.S. 608.

3. The court below found that the picketing at the Gretna Wharf was secondary, and directed the Board "to enter an appropriate injunction" based on it, in a proceeding instituted by Superior against the Board to review that part of the Board's order dismissing the complaint insofar as it alleged inducement of railroad workers (R. 1-5). This review proceeding was consolidated with the enforcement proceeding instituted by the Board against the Union to enforce that part of the order directing the Union to desist from secondary activity (R. 10-14). The Union moved to intervene in the review proceeding (R. 15-22), but the court below denied intervention (R. 23).[11] Thus, in a proceeding in which the Union was denied intervention, the court below decided that the Union was engaged in illegal activity and directed the issuance of an injunction against it.

The Union had an absolute right to intervene. Nothing could make this plainer than the fact that the court directed the issuance of an injunction against it. *Cf.*, *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio Railroad Co.*, 331 U.S. 519, 530. The Board would have no power to find that a person has engaged in an unfair labor practice and to enter an order against it if the person were not a party to the proceeding. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, 233. A court has no greater power. It is fundamental that "no court can adjudicate directly upon a person's right, without the party being actually or constructively before the court."

[11] The Union was granted leave to file a brief as amicus curiae (R. 23), which it did.

Mallow v. *Hinde*, 12 Wheat. 193, 198. Since the Union was not a party to the review proceeding, but was indeed denied intervention in it, the court was without power to adjudicate the Union's conduct and the court's direction to enter an injunction against the Union was a nullity.

CONCLUSION

For the reasons stated this petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 1960.